SLR:RKH:KMA;2015V01336

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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LOUIS FLORES,

Plaintiff,

-against -

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

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Civil Action No. 15-CV-02627

(Azrack, J.)
(Mann, C.M.J.)

# DEFENDANT'S RESPONSE TO PLAINTIFF'S OBJECTION TO THE CHIEF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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## PRELIMINARY STATEMENT

Defendant United States Department of Justice ("DOJ") respectfully submits this response to Plaintiff's Objection to the Chief Magistrate Judge's Report and Recommendation filed on November 3, 2016 ("Plaintiff's Objection")(Dkt. #50). *See* Fed R. Civ. P. 72(b)(2).

Plaintiff Louis Flores, proceeding *pro se*, brought this action to compel a response to a request that he made under the Freedom of Information Action ("FOIA"), 5 U.S.C. § 552, for records of the United States Attorney's Office for the District of Columbia ("USAO-DC"). *See* Compl. (Dkt. #1). Plaintiff's Amended Complaint, which was filed after DOJ provided a response to the FOIA request, claimed that the response was incomplete, alleged bad faith conduct by DOJ components, and requested the assessment of penalties and sanctions. Dkt. #15; *see also* Dkt. #16.

In the thorough and well-reasoned Report and Recommendation dated October 4, 2016 (Dkt. #48) ("R&R"), Chief Magistrate Judge Roanne L. Mann recommended that Defendant's cross-motion for summary judgment dismissing this action be granted in its entirety, and that Plaintiff's cross-motions for partial summary judgment and for sanctions and penalties be denied. Specifically, the R&R concluded that Defendant's searches, which yielded no responsive records, were adequate. *See* R&R at 22-30. The R&R also found that Plaintiff failed to meet his burden of demonstrating that Defendant acted in bad faith. R&R at 30-32. The R&R recommended denying both Plaintiff's motion pursuant to Fed. R. Civ. P. 52 and his requests for sanctions, penalties, and appointment of a monitor. R&R at 33.

Plaintiff's Objection contends that the Chief Magistrate Judge committed multiple errors and that this Court should reject the R&R. *See* Pl. Objn. at 2-3, 38. However, as shown below and in Defendant's motion, DOJ established that it was entitled to summary judgment as a matter of law, and Plaintiff has not demonstrated that he is entitled to any relief under the FOIA. Further,

Plaintiff failed to demonstrate any basis for imposition of sanctions or penalties. Accordingly, the Court should adopt the R&R in its entirety. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

## STATEMENT OF THE CASE

In his FOIA request dated April 30, 2013,[1] Plaintiff sought "records pertaining to the prosecution of Lt. Daniel Choi ("Lt. Choi")" by the USAO-DC,[2] and

1. All records and information pertaining to the legal basis of prosecuting activists, who engage in protests, including but not limited to . . .

2. All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the arrest and/or prosecution of Lt. Choi, . . .

3. All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the Department of Justice or U.S. Attorney's Office to fail to refer to Lt. Choi by his military rank, in accordance with Army Regulation 670-1.

4. The total cost of the prosecution of Lt. Choi, . . .

*See* AUSA Singh Decl. Ex. A.

After Plaintiff filed this action, in 2015, Karin Kelly, USAO-DC FOIA Coordinator, conducted searches for responsive records.[3] Declaration of Karin Kelly dated September 30, 2015 (Dkt. #20-6)("Kelly Decl.") ¶¶ 1, 6-24. A search using the term "activist" was conducted of the Legal Information Network System ("LIONS"), a case management system that is used by the USAO-DC Criminal, Civil, and Appellate Divisions to track activities in matters, district court

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[1] Although Plaintiff repeatedly refers to this as "the First FOIA Request," it is the only FOIA request at issue in this action.

[2] Daniel Choi ("Choi") was one of thirteen defendants who were arrested and charged in *United States v. Farrow, et al.*, 10-mj-00739 (JMF)(D.D.C.), with failure to obey a lawful order (a misdemeanor) after handcuffing themselves to White House fence and failing to obey repeated warnings to leave. *See* Dkt. #41-1 at 7.

[3] As of the time this action was filed, EOUSA could not locate Plaintiff's FOIA request, but after obtaining a copy of it as a result of this litigation, instructed the USAO-DC to conduct a search for the requested records. Declaration of Princina Stone dated September 30, 2015 (Dkt. #20-5)("Stone Decl.") ¶¶ 4-7.

cases and appeals, and that search produced no results. *Id.* ¶¶ 13-15. Ms. Kelly ascertained that the Replicated Criminal Information System ("RCIS") database, which is used by the USAO-DC to track information (including case, arrest and witness data) from cases originating in the Superior Court of the District of Columbia, did not use the term "activist," and, therefore, could not be searched using that term. *Id.* ¶¶ 10-12. Ms. Kelly also contacted the AUSA assigned to the Choi case, who informed her that the USAO-DC does not use the term "activist" or specifically "target" anyone (thus indicating that a search using those terms would not locate any responsive records) and that there was no manual regarding prosecution of activists. *Id.* ¶¶ 16-18. As to the costs of the Choi prosecution, the USAO-DC Budget Officer informed Ms. Kelly that information about the costs incurred in a multi-defendant case was not maintained on a defendant-by-defendant basis. *Id.* ¶¶ 21-24. Finally, Ms. Kelly noted that the third item in Plaintiff's FOIA request was a question (about the use/nonuse of Choi's military title) and not a request for records. *Id.* ¶ 20.

The Executive Office for United States Attorneys ("EOUSA"), the DOJ component that processes and responds to FOIA requests for U.S. Attorneys' Offices' records, provided the response to Plaintiff's FOIA request by letter dated August 17, 2015. Declaration of Assistant U.S. Attorney Rukhsanah L. Singh dated November 23, 2015 (Dkt. #20-4)("AUSA Singh Decl.") Ex. I; Declaration of Louis Flores dated January 5, 2016 (Dkt. #26)("Pl. Decl.") Ex. F. In that letter, EOUSA advised Plaintiff that the searches conducted by the USAO-DC had revealed no responsive records. *Id.* In addition, the EOUSA made a discretionary release of 331 publicly available USAO-DC records from the Choi case that were not responsive to Plaintiff's request. *See id.*; *see also* Kelly Decl. ¶¶ 25-28. Citing the Privacy Act (5 U.S.C. § 552a), EOUSA explained that the nonpublic records could not not be released absent express authorization and consent of the third party whom they concerned. AUSA Singh Decl. Ex. I; Pl. Decl. Ex. F.

In an effort to avoid unnecessary motion practice, on October 13, 2015, Defendant's counsel sent Plaintiff copies of the Kelly and Stone Declarations (that would be used to support DOJ's contemplated summary judgment motion) and additional records that had not been sought in Plaintiff's FOIA request. *See* AUSA Singh Decl. Ex. K. Those documents included two exhibits from the Choi case and sections of the United States Attorneys' Manual ("USAM") relating to demonstrations and prior approval by the DOJ Criminal Division. *See id.* at 2-3. The cover letter also provided website links for other sections of the USAM, sections of the Criminal Resource Manual to the USAM, an Attorney General Memorandum, and DOJ guidance relating to prosecution of members of the news media and/or implications of the First Amendment in the prosecution of certain crimes; the letter noted that none of these materials concerned activists, protestors or demonstrators. *Id.* at 3-6.

Further, as encouraged by Chief Magistrate Judge Mann at the status conference on September 16, 2015, DOJ conducted voluntary searches in "Main Justice" for written guidelines for the prosecution of activists. *See* AUSA Singh Decl. Ex. K at 1. By letter dated October 15, 2015, Defendant's counsel advised Plaintiff that a voluntary search of the Office of the Assistant Attorney General ("OAAG") for the Criminal Division, the DOJ component responsible for formulating and implementing DOJ's criminal enforcement policy, had not located any written guidelines or other documents relating to the prosecution of activists or references to targeted prosecution of activists. AUSA Singh Decl. Ex. L.

Nevertheless, Plaintiff was not satisfied. *See* AUSA Singh Decl. Ex. M; Dkt. #18 (Status Report dated November 5, 2015). Therefore, pursuant to the so-ordered briefing schedule (*see* Dkt. #19), Defendant served and filed a motion for summary judgment on November 23, 2015. Dkt. #20. On January 4, 2016, Plaintiff filed his opposition to Defendant's motion and a cross-motion for partial summary judgment and a motion for sanctions under Fed. R. Civ. P. 52. Dkt. #23-#26;

*see also* Dkt. #27-#29 (Defendant's reply and opposition), #30-#33 (Plaintiff's reply). By Order dated May 27, 2016, the Court referred the motions to Chief Magistrate Judge Mann for an R&R.

After hearing oral argument on the motions on July 11, 2016, Chief Magistrate Judge Mann encouraged the parties to further discuss the matter and suggested that DOJ voluntarily provide another declaration regarding the absence of responsive records. Tr. 49-50. On July 25, 2016, Plaintiff filed a letter stating that the parties had not reached a settlement. Dkt. #36. By Order dated August 8, 2016, Chief Magistrate Judge Mann directed DOJ to provide supplemental declarations with more information about the databases and searches in the USAO-DC. Dkt. #37.

On August 24, 2016, Defendant filed the Declaration of Daniel F. Van Horn dated August 24, 2016 (Dkt. #41-1)("Van Horn Declaration"). In his declaration, Van Horn, Chief of the Civil Division, USAO-DC, provided additional information about the RCIS and LIONS case tracking databases. He stated that the databases contain factual information for individual cases and matters, such as the case docket number, filing date, identities of the parties, victims, witnesses, presiding judges and assigned USAO-DC staff, case type and descriptions, court schedules and pertinent events. Van Horn Decl. ¶¶ 4-5, 10. Chief Van Horn further explained that neither RCIS nor LIONS contains the underlying case files, but could be used to identify where the case files may be located. *Id.* ¶ 6. At Chief Van Horn's request, additional searches were conducted of RCIS and LIONS using these search terms: demonstration, demonstrations, protest, protests, rally, rallies, march, marches, picket, pickets, rebel, rebels, and mutiny. *Id.* ¶ 9. Those searches did not uncover any guidelines, policies, procedures and/or protocols concerning how the USAO-DC balances First Amendment rights of activists when making charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations that involve acts of civil disobedience or violations of criminal laws. *Id.* ¶ 9. Chief Van Horn also personally reviewed the Choi prosecution file (six boxes of records) and found no such guidelines, policies, procedures

and/or protocols. *Id.* ¶ 11. Chief Van Horn also spoke with the prosecutor in the Choi case, and confirmed that she was not aware any such guidelines, policies, procedures and/or protocols, whether in electronic or hard copy format. *Id.* ¶ 12. In addition, Chief Van Horn asked the Chiefs of the Appellate, Criminal, Special Proceedings and Superior Court Divisions, the senior leadership in the USAO-DC, if they were aware of any USAO-DC records, in electronic or hard copy format, containing guidelines, policies, procedures and/or protocols concerning how the USAO-DC balances First Amendment rights of activists. *Id.* ¶ 13. None of them was aware of any such guidelines, policies, procedures and/or protocols. *Id.*

Plaintiff filed a response on September 2, 2016. Dkt. #43.

## ARGUMENT

### THE COURT SHOULD GRANT SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CLAIMS UNDER THE FOIA AND DENY PLAINTIFF'S CROSS-MOTIONS

This Court should adopt in its entirety the R&R, which recommends granting Defendant's motion for summary judgment and denying Plaintiff's cross-motion for partial summary judgment. *See* Fed. R. Civ. P. 72(b)(3). As shown below, Defendant established that there was no genuine dispute as to any material fact and that it was entitled to summary judgment as matter of law because no records responsive to Plaintiff's FOIA request have been withheld. *See* Fed. R. Civ. P. 56(a). Thus, Plaintiff did not establish that he was entitled to any relief under the FOIA. Moreover, Plaintiff's Objection fails to demonstrate anything that would compel a different outcome.[4]

[4] It appears that Plaintiff may believe that the Court's review is limited to determining whether the R&R is "clearly erroneous or contrary to law." *See* Pl. Objn. at 38. However, that standard that applies to review of a federal magistrate judge's order determining nondispositive matters under 28 U.S.C. § 636(b)(1)(A). *See* Fed. R. Civ. P. 72(a). Where, as here, the review is of a recommended disposition, a court makes a *de novo* determination regarding of the portions of the R&R to which objection has been made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

**A. DOJ is Entitled to Summary Judgment**

The FOIA requires United States government agencies to disclose agency records upon receiving a properly submitted written request for them. 5 U.S.C. § 552(a)(3)(A). The FOIA authorizes courts only to enjoin an agency from improperly withholding agency records from a person who made has made a proper written request for the records. 5 U.S.C. § 552(a)(4)(B); *see* 5 U.S.C. § 552(a)(3)(A). A court cannot provide relief under the FOIA unless the requestor demonstrates that the agency has (1) improperly (2) withheld (3) agency records that are not exempt or excluded. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 159 (1980); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999)("Only when each of these criteria is met may a district court 'force an agency to comply with the FOIA's disclosure requirements.'")(quoting *Reporters Committee*, 445 U.S. at 150).

In a FOIA action, "[a] district court may grant summary judgment in favor of an agency on the basis of agency affidavits if they contain *reasonable* specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Grand Central Partnership*, 166 F.3d at 478 (internal quotation marks and citation omitted)(emphasis in original). Here, DOJ responded that it was unable to locate any records responsive to Plaintiff's FOIA request. Singh Decl. Ex. I. Thus, the issue to be determined is whether DOJ conducted adequate searches for responsive records.

When a plaintiff questions the adequacy of the agency's search, the question is whether the search was reasonably calculated to discover the requested documents. *See Grand Central Partnership*, 166 F.3d at 488-89 (citation omitted). The adequacy of a search is measured by a reasonableness standard and depends on the individual circumstances of the request in each case. *See Judicial Watch v. Dep't of State*, Civil Action No. 15-CV-690 (RMC), 2016 WL 1367731, at *2 (D.D.C. Apr. 6, 2016); *see also Trentadue v. Federal Bureau of Investigation*, 572 F.3d 794,

797 (10th Cir. 2009)(collecting cases). An agency "is not expected to take extraordinary measures to find requested records." *Garcia v. U.S. Dep't of Justice Office of Information and Privacy*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002)(citation omitted). The adequacy of a search "is determined not by the fruits of the search but by the appropriateness of the methods used to carry out the search." *Paxson v. U.S. Dep't of Justice*, 41 F. Supp. 3d 55, 60 (D.D.C. 2014)(internal quotation marks and citation omitted). A search is reasonable and adequate even if it fails to produce all relevant material. *Garcia,* 181 F. Supp. 2d at 368.

"Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search . . . are sufficient to sustain the agency's burden" and "are accorded a presumption of good faith." *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)(footnote, internal quotation marks and citations omitted); *see Conti v. U.S. Dep't of Homeland Security*, No. 12 Civ. 5827 (AT), 2014 WL 1274517, at *11 (S.D.N.Y Mar. 24, 2014)("reasonableness may be established solely on the basis of the government's relatively detailed, non-conclusory affidavits that are submitted in good faith."). Declarations describing a search will be sufficient to meet the agency's burden if they "identify the searched files and describe at least generally the structure of the agency's file system which renders any further search unlikely to disclose additional relevant information." *Dennis v. Alcohol, Tobacco, Firearms and Explosives*, No. 12-CV-3795 (JG), 2013 WL 6579581, at *5 (E.D.N.Y. Dec. 13, 2013)(quoting *Rabin v. U.S. Dep't of State*, 980 F. Supp. 116, 120-21 (E.D.N.Y. 1997); *see also Davis v. U.S. Dep't of Homeland Security*, No. 11-CV-203 (ARR)(VMS), 2014 WL 4101477, at *1 (E.D.N.Y. Aug. 14, 2014).

Here, as required by Fed. R. Civ. P. 56(c)(1), DOJ supported the facts concerning its searches that it is asserting cannot be genuinely disputed with particular parts of the materials in the record, primarily the Kelly Declaration and the Van Horn Declaration. As the R&R recognizes, DOJ demonstrated that it conducted adequate searches designed to locate records responsive to

Plaintiff's specific requests. Initially, under the supervision of the USAO-DC FOIA Coordinator, searches were conducted in LIONS, the database used by the USAO-DC to track all matters, district court cases and appeals, using the search term "activist." Kelly Decl. ¶¶ 13-15. That search produced no results. *Id.* ¶ 15. A search was not conducted in the RCIS, a database containing information about cases originating in the Superior Court of the District of Columbia, because the RCIS IT Specialist advised that the system did not use the term "activist" and a search using that term could not be done. *Id.* ¶¶ 10-12. In 2016, at the request of the Chief of the Civil Division, the USAO-DC conducted a second round of broader searches, this time in both LIONS and the RCIS, using the search terms "demonstration," "demonstrations," "protest," "protests," "rally," "rallies," "march," "marches," "picket," "pickets," "rebel," "rebels," and "mutiny." Van Horn Decl. ¶ 9. Those searches, using terms that there was no obligation to use, did not uncover any guidelines, policies, procedures and/or protocols concerning how the USAO-DC balances First Amendment rights of activists when making charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations that involve acts of civil disobedience or violations of criminal laws. *Id.*

Although RCIS and LIONS would contain information about the case type and description (*see* Van Horn Decl. ¶¶ 4-5), the legal basis for prosecuting "activists" would not have been identifiable from searches of those databases since "activist" is not a term used or tracked by the USAO-DC. *See* Kelly Decl. ¶¶ 12, 14. Moreover, those databases are not designed to be, nor are they used as, repositories for policy documents. *See* Van Horn Decl. ¶ 10. However, the USAO-DC's searches were not limited to its case tracking databases. In 2015, the USAO-DC FOIA Coordinator asked the prosecutor assigned to the Choi case about Plaintiff's request for records and information pertaining to the legal basis for prosecuting activists. Kelly Decl. ¶ 16. The AUSA told Ms. Kelly that the USAO-DC does not use the term "activist" or specifically target anyone

and that she did not have a manual to refer to regarding the prosecution of "activists." Kelly Decl. ¶¶ 16-18. In 2016, Chief Van Horn spoke with the prosecutor and confirmed that she was not aware any guidelines, policies, procedures and/or protocols, whether in electronic or hard copy format, concerning how the USAO-DC balances the First Amendment rights of activists when making charging decisions or undertaking prosecutions. Van Horn Decl. ¶ 12. Chief Van Horn also went through the six boxes of records comprising the Choi file, and did not find any guidelines, policies, procedures and/or protocols concerning how the USAO-DC balances the First Amendment rights of activists when making charging decisions or undertaking prosecutions. Van Horn Decl. ¶ 11.

In addition, Chief Van Horn asked the senior leadership of the USAO-DC litigating components -- the Chiefs of the Criminal, Appellate, Special Proceedings and Superior Court Divisions -- if they were aware of any USAO-DC guidelines, policies, procedures and/or protocols, in electronic or hard copy format, concerning how the USAO-DC balances First Amendment rights of activists when making charging decisions or undertaking prosecutions of activists arising from their participation in protests or demonstrations that involve acts of civil disobedience or violations of criminal laws. Van Horn Decl. ¶ 13. None of them was aware of any such guidelines, policies, procedures and/or protocols. *Id.*

Thus, despite diligent searches in the locations in which any guidelines, policies, procedures and/or protocols concerning prosecution of "activists" could reasonably be expected to be found, the USAO-DC did not locate any responsive records.[5] Moreover, no one who could be expected to be aware of them knew about the existence of any such guidelines, policies, procedures

[5] Although beyond the scope of Plaintiff's FOIA request, which sought the USAO-DC's records, as a courtesy to the Court and in an effort to resolve this litigation, the OAAG for the Criminal Division, DOJ, voluntarily conducted a search for any written guidelines regarding the prosecution of "activists." *See* Dkt. #15. No records were located. *Id.*

and/or protocols. Where documents do not exist, there can be no withholding in response to a FOIA. *See Lane v. Dep't of Justice*, 02-CV-6555 (ENV)(VVP), 2006 WL 1455459, at *11 (E.D.N.Y. May 22, 2006). "A non-existent document is obviously not an agency record, . . . and the agency can satisfy its burden for this element by submitting detailed, nonconclusory affidavits that demonstrate that the agency made a reasonable search in light of all the circumstances." *Prince v. Schofield*, 98-CV-1224 (EHN), 1999 WL 1007344, at *3 (E.D.N.Y. Sept. 23, 1999") (internal quotation marks and citations omitted), *aff'd* 234 F.3d 1262 (2d Cir. 2000)(table). Therefore, as the R&R finds, Defendant performed an adequate search for records responsive to the first two items in Plaintiff's FOIA request, which sought records and information pertaining to the legal basis of prosecuting "activists" and Choi.

Regarding Plaintiff's request for the "total cost of the prosecution of Lt. Choi" (Plaintiff's item 4), Choi was one of thirteen defendants in a multiparty case. *See* n.2, *supra*. The USAO-DC Budget Officer informed FOIA Coordinator Kelly that the USAO-DC does not record costs associated with a multiple defendant case on a defendant-by-defendant basis. Kelly Decl. ¶ 22. In other words, the total cost for prosecuting Choi is not information that is readily available. The USAO-DC would be required to create a record that does not exist in order to respond to Plaintiff's FOIA request. To compute the cost of the prosecution of Choi, the USAO-DC would need to search for, locate and review the individual budget requests submitted by individuals who worked on the case, segregate the budget requests for costs incurred relating to Choi, identify how much had been paid for each, and add up the amounts expended. An agency is not required to conduct research or create records to satisfy a FOIA request. *See Scaff-Martinez v. Drug Enforcement Administration*, 770 F. Supp. 2d 17, 22-23 (D.D.C. 2011)(citations omitted).

As to the remaining request (Plaintiff's item 3), Chief Magistrate Judge Mann agreed with DOJ's position that Plaintiff's "request" for the "legal basis" for DOJ not referring to Choi by his

military rank was a question and not a request for records. R&R at 28-29; *see* Kelly Decl. ¶ 20. The FOIA does not require an agency to answer questions disguised as a FOIA request. *See Service Women's Action Network v. Dep't of Defense*, 888 F. Supp. 2d 231, 241 (D. Conn. 2012); *Maydak v. Dep't of Justice*, 254 F. Supp. 2d 23, 45-46 (D.D.C. 2003)(citing *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985)). In any event, as Chief Magistrate Judge Mann pointed out, despite having gone through the Choi prosecution file, DOJ found no document that would provide a response to the question. *See* R&R at 29.

In sum, Defendant established that it is entitled to summary judgment dismissing this FOIA action. Further, Plaintiff failed to meet his burden of demonstrating a genuine dispute of material fact by citing to particular parts of materials in the record or by showing that the materials cited by DOJ do not establish the absence of genuine dispute or that DOJ cannot produce admissible evidence to support the fact. *See* Fed. R. Civ. P. 56(c)(1). Plaintiff's speculation and unsupported belief that responsive records must exist, without more, do not establish that DOJ did not conduct reasonable searches or the rebut presumption of good faith accorded to the agency declarations. *See Labella v. Federal Bureau of Investigation*, No. 11-CV-0023 (NGG)(LB), 2012 WL 948567, at *7 (E.D.N.Y. Mar. 19, 2012)(citations omitted); *Anderson v. U.S. Dep't of Justice*, No. 05-CV-2248 (JFB)(LB), 2007 WL 952038, at *9 (E.D.N.Y. Mar. 28, 2007)(citation omitted), *aff'd*, 326 Fed. Appx. 591 (2d Cir. 2009). The agency declarations were made by individuals with personal knowledge concerning the searches that the USAO-DC made for records responsive to Plaintiff's request, as required by Rule 56 of the Federal Rules of Civil Procedure. *See, e.g.*, *Carney*, 19 F.3d at 814 ("An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e)"). As discussed above, the declarations supplied sufficient facts showing that DOJ conducted thorough searches reasonably designed to locate responsive records.

Plaintiff did not rebut the facts about the searches set forth in DOJ's declarations by offering any tangible evidence that the requested records exist or of bad faith in the carrying out of the searches. As the R&R recognizes, Plaintiff's arguments about delay are unavailing. *See* R&R at 30-31. It is undisputed that EOUSA did not process and respond to Plaintiff's FOIA request until after he filed this action. *See* Stone Decl. ¶¶ 4-7. However, mere mix-ups and technical failings by an agency do not support a finding that search procedures were inadequate or support an inference of bad faith. *Garcia*, 181 F. Supp. 2d at 367; *see also Platsky v. Food and Drug Administration*, No. 13-CV-6250 (SLT)(RLM), 2014 WL 7391611, at *5 (E.D.N.Y. Dec. 23, 2014), *aff'd* 642 Fed. Appx. 63 (2d Cir. 2016). Further, Defendant's delay in responding does not establish bad faith. *Grand Central Partnership*, 166 F.3d at 489-90 (recognizing that an untimely production of responsive documents did not establish bad faith on the part of the agency).

In conclusion, Defendant is entitled to summary judgment dismissing this action.

**B. <u>There is No Merit to Plaintiff's Arguments Concerning Purported Errors in the R&R</u>**

Defendant responds to the correspondingly numbered sections of Plaintiff's Objection as follows:

**I. <u>The R&R Did Not Fail to Set Forth the Relevant Facts</u>**

**A. <u>Chief Magistrate Judge Mann Did Not Err in Construing the FOIA Request</u>**

Plaintiff maintains that the R&R at page 3 unjustly narrowly construes his FOIA request to only "number 4" and, therefore, deprives him of records that he expressly requested. Pl. Objn. at 5-6. This argument is unfounded. Page 3 of the R&R sets forth, in the Background section, the four enumerated items in Plaintiff's FOIA request. R&R at 3. Moreover, the R&R's discussion of the adequacy of DOJ's searches for responsive records (R&R 22-30) contains subsections addressing each of part Plaintiff's FOIA request under these captions: "*Policies and Guidelines Concerning Prosecutions of Activists and Mr. Choi*" (*i.e.*, items 1 and 2)(R&R at 25-28); "*Legal*

*Basis for DOJ's Alleged Failure to Refer to Mr. Choi by Rank*" (*i.e.*, item 3)(R&R at 28-29); and "*Costs of Choi Prosecution*" (*i.e.*, item 4) (R&R at 29-30). Thus, the R&R considered all parts of Plaintiff's FOIA request, and did not not narrowly construe it or limit it to only "number 4."

In the event that Plaintiff is arguing that the R&R should have addressed eighteen (18) items rather than the four numbered items in his FOIA request, such argument fails. The FOIA request did not comprise "18 itemized requests" as Plaintiff contends. *See* Pl. Objn. at 5.The lettered subsections under requests numbers 1 to 4 are merely identify specific types of records and information purportedly falling into the respective categories. *See* AUSA Singh Decl. Ex. A. at 3-4. They are not separate requests, let alone separately enumerated items. In any event, there were no responsive records located for the generally worded enumerated items, which encompassed the specific items listed under them.

**B. Chief Magistrate Judge Mann Did Not Select Facts and Exhibits Prejudicial to Plaintiff**

This section of Plaintiff's Objection concerns immaterial matters that, even if there were merit to Plaintiff's arguments, would not preclude summary judgment.[6] Pl. Objn. at 6-9. Plaintiff first goes on at length about whose exhibits were cited in the R&R. *See* Pl. Objn. at 6-8. However, any variation in the individual exhibits is irrelevant. These exhibits simply provide procedural context for the motions. The only material fact to which these exhibits relate is that Plaintiff made a FOIA request, and that fact is undisputed. Beyond that, the exhibits relating to the submission and receipt of the FOIA request are immaterial. *See* Pl. Objn. at 6-7. The other exhibit, "Plaintiff's Index," is merely part of the procedural history, and not evidence being used to establish any

[6] For a fact to be material, it must affect the outcome of the action under the governing substantive law; a dispute about an irrelevant fact cannot preclude entry of summary judgment. *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 248 (1986*).*

material fact. *See* Pl. Objn. at 7-8. No prejudice resulted from citing one party's exhibit rather than that of the other party in the R&R.

Plaintiff also asserts that Chief Magistrate Judge Mann cited a passage from the "Joint Status Report" that is false. Pl. Objn. at 8 (citing R&R at 6). Again, the R&R merely recites a statement made in the November 5, 2015 letter (Dkt. #18) as part of the procedural background; there is no proposed factual finding on page 6 of the R&R. In any event, Defendant's position stated in that letter -- that all non-exempt records responsive to Plaintiff's FOIA request had been released to Plaintiff -- was not false. As set forth above in Point A, there are no records responsive to Plaintiff's request, and consequently none had been withheld.

**II. <u>Defendant Satisfies the Legal Standards for Summary Judgment</u>**

Contrary to Plaintiff's arguments, Chief Magistrate Judge Mann did not err in her recommended finding that Defendant was entitled to summary judgment. As set forth above in Point A, DOJ demonstrated that, despite multiple searches, it was unable to locate any records responsive to Plaintiff's FOIA requests. Thus, was withheld from Plaintiff -- improperly or otherwise – and Plaintiff is not entitled to any relief under the FOIA.

**A. <u>Chief Magistrate Judge Mann Did Not Ignore Genuine Disputes of Material Fact</u>**

Plaintiff contradictorily states that "[t]he absence of material facts was sworn to by Plaintiff in a Declaration" and that he has "disputed, contested, objected, or dispelled various aspects of Defendant's 56.1 Statement" and that the R&R did not resolve genuine disputes of material facts. Pl. Objn. at 9. Notably, Plaintiff does not identify any genuine disputes that preclude the resolution of the summary judgment motions. The essential facts surrounding the FOIA request are undisputed: Plaintiff made a FOIA request, and DOJ responded that that it could not locate any responsive records. The only question is a legal one: whether the searches that Defendant conducted were reasonably calculated to discover the requested documents (if they exist). As

shown in Point A, DOJ conducted adequate searches, and Plaintiff failed to rebut presumption of good faith accorded to the agency declarations.

**B. Chief Magistrate Mann Did Not Resolve All Ambiguities "Against Plaintiff"**

The sole "dispute" as to which Plaintiff contends Chief Magistrate Judge Mann erred by resolving an ambiguity in DOJ's favor concerned the email that Plaintiff sent with his FOIA request. Pl. Objn. at 9-10. However, for purposes of summary judgment, that "dispute" is wholly irrelevant. All that matters is that Plaintiff made a FOIA request. There is no dispute that he did.[7]

**C. Chief Magistrate Judge Mann Did Not Ignore Evidence**

Plaintiff asserts that Chief Magistrate Judge Mann ignored evidence from which reasonable inferences could be drawn in his favor, but fails to point to any evidence that was ignored in the R&R. Pl. Objn. at 10. Rather, Plaintiff's argument concerns DOJ's initial inability to locate his FOIA request. However, any issues as to when and by whom the request was received are irrelevant. Defendant has never taken the position that this action should be dismissed because Plaintiff did not make a FOIA request. Further, the point of Plaintiff's argument is unclear. The only relief which the Court could provide to Plaintiff under the FOIA would be to order the release of improperly withheld responsive records. *See* 5 U.S.C. § 552(a)(4)(B*). See Cunningham v. U.S. Dep't of Justice*, 961 F. Supp. 2d 226, 236 (D.D.C. 2013)("FOIA is remedied by ordering the

[7] Since Plaintiff does not elaborate on his statement that "DOJ made misrepresentations during the proceedings before this Court" (Pl. Objn. at 10), Defendant is unable to respond to that vaguely worded contention. To the extent that Plaintiff is referring to his assertion that DOJ claimed to have never received the FOIA request (*see* Pl. Objn. at 11), Defendant made no misrepresentation. In the Answer and Answer to Amended Complaint, Defendant admitted the receipt of various emails from Plaintiff. Dkt. #9 ¶ 4; Dkt. ¶ #17 ¶ 4. However, at the time this action was filed, EOUSA was unable to locate Plaintiff's FOIA request. Stone Decl. ¶¶ 4-5. Accordingly, at the time of the filing of the Answer, Defendant was unable to admit or deny Plaintiff's allegations describing the contents of the request. Dkt. #9 ¶¶ 34-38. However, the Answer to Amended Complaint admits, where appropriate, those allegations. Dkt. #15 ¶¶ 34-38.

production of agency records without money damages.")(citations omitted). As shown in Point A, Plaintiff is not entitled to any relief under the FOIA.

**III. Chief Magistrate Judge Mann Fully Considered Plaintiff's Allegations That Documents Have Been Withheld by DOJ**

Plaintiff asserts that DOJ essentially provided a "No Number, No List" or a *Glomar* response to his FOIA request, and that Chief Magistrate Judge Mann should not have rejected his arguments on that subject. Pl. Objn. at 11-12. However, DOJ did not provide either type of a response. A "No Number, No List" response to a FOIA request acknowledges that there are responsive documents, but does not state how many documents or identify them by title or description. *See New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 105 (2d Cir. 2014). A *Glomar* response is when an agency refuses to confirm or deny the existence of responsive records.[8] *See id.*; *Wilner v. National Security Agency*, 592 F.3d 60, 68 (2d Cir. 2009), *aff'd* 562 U.S. 828 (2010). Here, DOJ did not refuse to confirm or deny the existence of responsive documents or acknowledge that records existed but provide a "No Number, No List" response. Rather, DOJ responded that no responsive documents could be located. *See* Singh Decl. Ex. I.

Contrary to Plaintiff's arguments, the discretionary release of publicly available documents from the Choi prosecution that were not responsive to Plaintiff's FOIA request did not constitute a *Glomar* response, nor was a "*Vaughn* index" required.[9] *See* Pl. Objn. at 11-12. The other documents from the file that concerned a third party that were referred to in EOUSA's response also were not responsive to Plaintiff's FOIA request (*see* Singh Decl. Ex. I), and the six boxes of

[8] The terms "*Glomar* response" and "glomarization" are derived from the case of *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976), in which the FOIA requestor sought records related to the efforts of the Central Intelligence Agency to prevent the media from reporting on the activities of a vessel named the *Hughes Glomar Explorer*.

[9] A *Vaughn* index is an itemized explanation of an agency's reasons for withholding documents. *See Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973); *see also Halpern v. Federal Bureau of Investigation*, 181 F.3d 279 (2d Cir. 1999).

Choi file, which were searched by Chief Van Horn, contained no responsive records. *See* Van Horn Decl. ¶ 11. "[I]t is elementary that an agency's decision to withhold *non-responsive* material is not a violation of the FOIA." *Public Investors Arbitration Bar Ass'n v. U.S. Securities and Exchange Comm'n*, 930 F. Supp. 2d 55, 72 (D.D.C. 2013)(emphasis in original), *aff'd*, 771 F.3d 1 (D.C. Cir. 2014); *see Competitive Enterprises Institutes v. U.S. Environmental Protection Agency*, 12 F. Supp. 3d 100, 114 (D.D.C. 2014)("Documents that are 'non-responsive' to a FOIA request, . . ., are simply not subject to the statute's disclosure requirements, and agencies may thus decline to release such material without invoking a statutory exemption."). Thus, no *Vaughn* index was required for any of these documents since they were not responsive to Plaintiff's FOIA request.

Plaintiff also maintains that Chief Magistrate Judge Mann erred in finding that DOJ conducted an adequate search for responsive records. Pl. Objn. at 12-13. Plaintiff's arguments -- that DOJ has exhibited bad faith by not providing a *Vaughn* index and that other responsive records exist or likely exist -- are unavailing. As explained in the preceding paragraph, the *Vaughn* index requirement is inapplicable. In support of his claim that other responsive records exist, Plaintiff cites Tab D to Exhibit G to Plaintiff's Declaration (Dkt. #26). *See* Pl. Objn. at 13. That document comprises printouts of various sections of the USAM (Dkt. #26-9), which Plaintiff asserts prove the existence of "legal advise" (*sic*) that has not been produced. Pl. Objn. at 12-13. The first USAM section discussed by Plaintiff, Section 9-65.881, which is captioned "Demonstrations – Procedures," does not mention "activists." Dkt. 326-9 at p. 81. Likewise, there is no mention of "activists" in the second USAM provision, Section 9-65-882 ("Demonstrations – Investigative Decisions by United States Attorneys"), that Plaintiff discusses. Dkt. #26-9 at pp.81-82. *See* Pl. Objn. at 13-14. The only conceivable mention of advice refers to consulting the Department of State about the potential adverse affect on foreign relations, a factor to be considered in

determining whether the Federal Bureau of Investigation should be involved. *See* USAM § 9-65-882 (Dkt. #26-9 at p.82). Neither USAM section identifies or even refers to any legal advice or other written policy or guidelines, let alone policies specific to "activists," that could be deemed responsive to Plaintiff's FOIA request. The R&R correctly notes that none of the USAM sections or the other policy documents that DOJ identified concern the prosecution or First Amendment Rights of "activists." *See* R&R at 27-28; *see* AUSA Singh Decl. Ex. K.

In sum, there is no merit to Plaintiff's arguments that DOJ withheld responsive records.

**IV. Chief Magistrate Judge Mann Did Not Err in Denying Discovery**

Plaintiff incorrectly maintains that Chief Magistrate Mann blamed him for failing to demonstrate that DOJ willfully violated the FOIA, even though it was she who denied Plaintiff's request for discovery to prove DOJ's willful violations of the FOIA. *See* Pl. Objn. at 15-21; *see also* Dkt. # 14. As discussed above in Point A, Plaintiff failed to meet his burden of demonstrating that a genuine dispute of material fact precluded summary judgment. Since the sole issue is the adequacy of DOJ's search, Plaintiff had to offer more than conjecture and accusations of bad faith, which he failed to do. Plaintiff failed to show that DOJ's searches were conducted in bad faith. Further, contrary to Plaintiff's arguments (Pl. Objn. at 16-17), DOJ was not required to look beyond the "four corners" of his FOIA request, or to read his mind. *See Judicial Watch*, 2016 WL 1367731, at *3. Moreover, as noted above at 18 and n.7, there was no misconduct or representations by DOJ concerning Plaintiff's FOIA request. See Pl. Objn. at 17.

Chief Magistrate Mann properly denied Plaintiff's request for discovery. "In order justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, . . . or provide some tangible evidence that . . . summary judgment is otherwise inappropriate." *Carney*, 19 F.3d at 813. "[D]iscovery relating to the agency's search . . . generally is unnecessary if the

agency's submissions are adequate on their face." *Id.* at 812. Here, the issues Plaintiff identifies that purportedly necessitated discovery do not concern the adequacy of the agency's search. Rather he alleges that certain actions (or inaction) regarding the receipt and delay in processing of the FOIA request constituted bad faith. Pl. Objn. at 17-18, 20. However, none of these preliminary matters are material to the issue in this case, *i.e.*, whether DOJ's search for responsive records was adequate. Further, as discussed above at 14, delay in responding is not a basis for finding that an agency did not conduct its search in good faith.

Regarding Plaintiff's other arguments, neither Chief Van Horn nor the AUSA assigned to the Choi prosecution ever said that they did not have, or claimed ignorance of, the USAM. *See* Pl. Objn. at 20. Neither one of them said anything about the USAM. The AUSA stated that she did not have a manual regarding prosecution of "activists" and was not aware of any guidelines, policies, procedures and/or protocols concerning "activists" and First Amendment rights. Kelly Decl. ¶ 18; Van Horn Decl. ¶ 12. After making extension inquiries, Chief Van Horn, stated that he was unaware of any such guidelines, policies, procedures or protocols. Van Horn Decl. ¶ 14. Further, Plaintiff's invocation of two computer software programs (Concordance and IPRO) available in a different USAO is futile. Pl. Objn. at 20-21. "FOIA does not give requestors the right to Monday-morning-quarterback the agency's search." *Immigrant Defense Project v. U.S. Immigration and Customs Enforcement*, 14-CV-6117 (JPO), 2016 WL 5339542, at *3 (S.D.N.Y. Sept. 23, 2016). The USAO-DC searched the systems that were likely to contain any responsive records. *See* Kelly Decl. ¶¶ 8-9. Nothing more was required. *See Judicial Watch v. Dep't of State*, No. 15-CV-690 (RMC), 2016 WL 1367731, at *2 (D.D.C. Apr. 6, 2016)("There is no requirement

that an agency search every record system, but the agency must conduct a good faith, reasonable search of those systems of records likely to possess the requested records.")(citation omitted).[10]

## V. Chief Magistrate Judge Mann Did Not Err Regarding DOJ's "Working Law"

Plaintiff maintains that Chief Magistrate Judge Man erred by disregarding the standard used to determine when the FOIA compels an agency to disclose its working law, and by refusing to compel DOJ to produce its working law. Pl. Objn. at 21-23. This argument simply recycles Plaintiff's claim that there must be responsive records.

The principle to which Plaintiff refers is embodied in the FOIA, which requires agencies to make certain information available to the public, including statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register and administrative staff manuals and instructions that affect a member of the public. 5 U.S.C. § 552(a)(2). This requirement provides no support for Plaintiff's allegation that DOJ has withheld responsive records. Rather, it undermines Plaintiff's argument. Indeed, Plaintiff's citation to, and discussions of sections of, the USAM (available on the DOJ website) show that DOJ has complied with the statutory directive. Plaintiff simply cannot accept the fact that DOJ does not have guidelines specifically for the prosecution of "activists" (whatever that term may mean) separate and apart from other individuals who are prosecuted for violating the law.

## VI. Chief Magistrate Mann Was Not "Frivolous" in Reaching a Conclusion About the Disclosure of Costs

Plaintiff contends that Chief Magistrate Judge Mann erred because she did not require DOJ to provide him with something that was not requested in his FOIA request -- the cost of the entire prosecution all of thirteen defendants. Pl. Objn. at 23-24. Chief Magistrate Judge Mann correctly held that Plaintiff was not permitted to broaden his request after DOJ responded during the course

[10] The remaining portion of this section of Plaintiff's Objection concerning "DOJ's working law appears to be misplaced. *See* Pl. Objn. at 19-20.

of the litigation that there was no record responsive to his request for the cost of Choi's prosecution. R&R at 29-30; *see also supra*, at 12. *See Gillin v. Internal Revenue Service*, 980 F.2d 819, 823 n.3 (1st Cir. 1992)(The plaintiff's request to clarify his FOIA request "amounted to an impermissible attempt to expand a FOIA request after the agency has responded and litigation has commenced"); *Amnesty International USA v. Central Intelligence Agency*, No. 07 Civ. 5435 (LAP) 2008 WL 2519908 at *13 (S.D.N.Y. June 19, 2008)(agency was not required to compile a list of individuals or conduct another search based on subsequent modification of the FOIA request); *see also Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996)("Requiring an additional search each time the agency receives a letter that clarifies a prior request could extend indefinitely the delay in processing new requests."); *Biberman v. Federal Bureau of Investigation*, 528 F. Supp. 1140, 1144 (S.D.N.Y. 1982)("It would be untenable to hold that, as the litigation proceeds, a plaintiff, by continually adding new requests could command a priority based on the date of the initial requests. Stated simply, the litigation would then be a vehicle for endless additional FOIA requests and would effectively grant to litigating plaintiffs a preference over all other FOIA claimants.")(punctuation and citation omitted).

## VII. The Finding that DOJ Made a Good Faith Search for Responsive Records is Supported by the Record

Plaintiff's Objection offers no new or persuasive argument showing that DOJ's search was not reasonably designed to locate responsive records. *See* Pl. Objn. at 24-30. As shown above in Point A, the USAO-DC conducted multiple searches in databases and files that were reasonably designed to locate responsive records (if they exist). Regarding the people Plaintiff identifies, privacy issues aside, individuals are not prosecuted because they are "activists" (whatever that term means) but because they violated the law.

## VIII. Plaintiff Offers No Argument Showing That Chief Magistrate Judge Mann Failed to Analyze "Devastating, Negative Implications on FOIA"

This section of Plaintiff's Objection simply repeats, in a rather disjointed fashion, arguments from earlier sections. *See* Pl. Objn. at 30-35. Defendant incorporates by reference its respective responses.

**IX. Chief Magistrate Mann Did Not Improperly Ignore the "Devastating, Negative Implications on the First Amendment**

Plaintiff contends that Chief Magistrate Judge Mann gave "short shrift" to First Amendment issues. Pl. Objn. at 35-37. Plaintiff's reliance on the common law and First Amendment right of access to court records is misplaced.[11] *See* Pl. Objn. at 36, citing *U.S. v. Erie County*, 763 F.3d 235 (2d Cir. 2014). The records that Plaintiff sought, if they existed, would be agency records, not judicial records, and the common law or First Amendment right of access would be wholly inapplicable to them. The "right" of access to agency records derives from the FOIA. The only question is whether Plaintiff is entitled to relief under the FOIA because DOJ has improperly withheld responsive records. Absent the assertion of a FOIA exemption that entails a balancing test (such as Exemption 7(C)), which is not the issue here, Plaintiff's reason for making the request would be irrelevant.

**X. Chief Magistrate Judge Mann Did Not Cast Aspersions on Plaintiff**

Plaintiff's last argument is that Chief Magistrate Judge Mann resorted to casting aspersions on him in order to recommend summary judgment for DOJ. Pl. Objn. at 37-38. This argument is unfounded and based solely on Plaintiff's disagreement with the R&R and his hypothesis that "[t]he only way the Chief Magistrate Judge could reach conclusions that were not based on the record would be to cast aspersions on Plaintiff or on Plaintiff's arguments." Pl. Objn. at 37. To the

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[11] *See Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 597 (1978) ("courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.")(footnotes omitted); *but see U.S. v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)(the mere filing of a paper or document with the court "is insufficient to render that paper a judicial document subject to the right of public access.").

contrary, Chief Magistrate Judge Mann was remarkably attentive to Plaintiff's concerns and made extra efforts to resolve this matter and to assist Plaintiff. She encouraged DOJ to provide Plaintiff with additional nonresponsive documents and to undertake searches for records that went beyond the scope of Plaintiff's FOIA request (including the search conducted by the policy component of the DOJ Criminal Division), and she required Defendant to conduct additional searches in the USAO-DC. *See* AUSA Singh Decl. Ex. K and L; Dkt. #37.

**C. The Court Should Deny Plaintiff's Motion for Sanctions and Penalties**

Plaintiff's Objection does not expressly discuss the portion of the R&R recommending that his motion for sanctions and penalties "under Rule 52" be denied. *See* R&R at 33. Thus, this Court is not required to conduct a de novo review of that portion of the R&R, and should simply adopt it in its entirety and deny Plaintiff's motion. *See* Fed. R. Civ. P. 72(b)(3).

In the event that the Court deems it necessary to consider Plaintiff's motion, Defendant incorporates by reference its arguments in the Memorandum of Law in Opposition to Plaintiff's Cross-Motion Under Rule 52 and Demand for Sanctions and Penalties (Dkt. # 28). In brief, as the R&R recognized, Rule 52 of the Federal Rules of Civil Procedure, is inapplicable. Indeed, Rule 52 expressly provides that when ruling on a motion under Rule 56, a court is not required to state findings and conclusions, as otherwise required by Rule 52. Fed. R. Civ. P. 52(a)(3). Further, there is no basis for granting Plaintiff's request for the imposition of sanctions and penalties of not less than $1,000,000. As the R&R correctly concludes and as Defendant has demonstrated, Plaintiff has not shown that DOJ acted in bad faith.

## CONCLUSION

For the foregoing reasons and those set forth in Defendant's prior court submissions, the Court should adopt in its entirety, the Report and Recommendation, which recommends that Defendant's motion for summary judgment be granted in its entirety, that Plaintiff's cross-motion for partial summary judgment and motion for sanctions and penalties be denied, and that this action be dismissed.

Dated: Brooklyn, New York
November 17, 2016

Respectfully submitted,

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